

**National Alliance for
Fair Contracting, Inc.**

Dedicated to fair, competitive contracting

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2001-014-914

July 6, 2001

General Services Administration
FAR Secretariate (MVR)
1800 F Street, N.W., Room 4035
Washington, DC 20405
Attention: Laurie Duarte

**Re: Comments on Federal Acquisition Regulation on Contractor
Responsibility; Labor Relations Costs and Costs Relating to
Legal and Other Proceedings. FAR Case 2001-014 (66
Federal Register 23134, May 7, 2001)**

Dear Ms. Duarte:

This is to request that you include in the record herein the attached comments of the National Alliance for Fair Contracting, Inc. (NAFC) in support of the responsible contractor regulations issued in final form on December 20, 2001.

Also attached are comments which have been submitted previously in support of the responsible contractor regulations by other fair contracting organizations which are members of NAFC. In addition to including NAFC's comments in the record, please include the comments of these organizations in the record herein in support of the responsible contractor regulations.

Sincerely yours,

Edward M. Smith Richard L. Forman

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Co-Chairman

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**COMMENTS OF THE
NATIONAL ALLIANCE FOR FAIR CONTRACTING, INC.
IN SUPPORT OF THE RESPONSIBLE CONTRACTOR REGULATIONS**

JULY 6, 2001

I. INTRODUCTION

Pursuant to the Notice in 66 Federal Register 23134 (FAR Case 2001-014), the National Alliance for Fair Contracting, Inc. (NAFC) is submitting comments in opposition to the proposed rule which would revoke the December 20, 2000 final rule addressing federal contractor responsibility and costs.

The National Alliance for Fair Contracting, Inc. is a national labor-management organization composed of some forty members. NAFC members include fair contracting organizations; joint labor-management groups; contractors; contractor associations; international and local unions; and building and construction trades councils. NAFC members have one thing in common: a deep commitment and involvement in fair and responsible public contracting. As such, NAFC strongly supports the responsible contractor regulations published on December 20, 2000. 65 Federal Register 80255. NAFC urges that the suspension of the regulations be lifted and that the Administration promptly begin enforcing their requirements for the grounds and reasons set forth below.

Responsible contracting ensures that the public, labor and management all derive immediate and significant benefits. The responsible contractor regulations will enhance federal contracting opportunities for fair, law-abiding, contractors; will bring greater compliance with the laws governing wages, hours and working conditions in public works construction; increase competition among contractors in bidding and performing public construction jobs; and provide a higher quality construction product to the government for each tax dollar. The responsible contractor regulations will protect workers employed in the federal contracting industry and will ensure that fair contractors are able to compete on a level playing field to win publically funded jobs.

**II. THE RESPONSIBLE CONTRACTOR REGULATIONS WILL PROTECT THE
FEDERAL GOVERNMENT, THE TAXPAYER AND THE LAW-ABIDING
CONTRACTOR COMMUNITY**

The responsible contractor regulations are good for all parties involved in public contracting: the government, the public, contractors and workers. NAFC members are involved on a daily basis in improving public contracting by bringing together labor, management and government to address the very problems which the responsible

contractor regulations seek to remedy. As such, NAFC and its members are in a unique position to demonstrate, from first-hand experience, the need for the responsible contractor regulations published on December 20, 2000. NAFC itself is a labor-management organization established to promote fair contracting by creating a "level playing field" for responsible bidders on publicly financed construction. Therefore, NAFC provides the perspective and experience of both the contractors who compete and win federal public contracts and the workers employed by these contractors to perform public contracts.

NAFC believes that the public, the government and the fair, law-abiding contractor community is well served by the responsible contractor regulations. These regulations will protect workers' rights on public projects; they will promote bid opportunities for fair contractors on public works; they will assure that bidders and contractors performing public construction abide by applicable laws and meet their legal responsibilities; they will ensure that fair contractors are able to compete on a level playing field to win publically funded jobs; they will protect workers employed in the public sector construction industry from exploitation; and they will ensure that responsible contractors and trained, skilled workers provide the taxpayer with efficient and productive construction of their public buildings and public works.

The regulations address a pervasive problem in the public contracting sector. This is the threat to responsible, reputable, law-abiding contractors bidding public construction jobs because of the existence of a thriving and nearly unchecked "underground economy" made up of unscrupulous, law-breaking contractors, who regularly "cheat to compete" by underpaying their workforce; cutting corners on payment of state and federal laws including tax laws- all in order to submit artificially low bids to win award of public contracts. For example, several years ago California Governor Pete Wilson estimated the size of the underground economy in California to be \$60 billion and the income tax loss to the state to be \$3 billion annually. This massive underground economy in construction has also been exposed in hearings in the California legislature where Rep. Richard Floyd has said:

There are thousands of businesses dealing strictly in cash, failing to report these transactions for tax purposes, paying no income tax, sales tax and no withholding taxes for employees. This widespread cheating means most taxpayers and businesses have to make up the lost revenue. Honest business cannot compete against these dishonest employers, and we want to find out why state agencies are not pressing down on the dishonest ones.

Another report several years ago by the Inspector General of the Department of Housing and Urban Development, who performed an audit of HUD's monitoring and enforcement of the labor standards, stated:

We found a direct relationship between labor standards violations and construction deficiencies. As a result, poor quality multi-family projects could be over-insured and excessive maintenance expenses [were] incurred correcting defective construction.

NAFC members encounter on a daily basis cases in which unscrupulous contractors break the law by keeping false payroll records, cheating by refusing to pay workers the wages they are due, failing to pay overtime rates for overtime work, hiring children for adult jobs and not paying workers' compensation or unemployment insurance taxes. Violations of labor laws in many states are particularly serious because of the large number of illegal aliens who, desperate for jobs and fearful of deportation, are willing to work for sub-minimum wages or to work "off the books". Contractors who flagrantly violate state and federal laws, including labor laws, are playing "enforcement roulette." Knowing that the chances of being caught are small and the punishment is usually light, they ignore the laws; hurt workers and hurt the public by avoiding paying billions of dollars in taxes and delivering a shoddy construction product to the public.

NAFC believes that Federal public construction, because of its need to be accountable to taxpayers, must build into its statutory and regulatory procurement scheme procedures to guard against law-breaking contractors winning bids who will exploit workers and provide the public with a sub-minimum level of contractor responsibility and job performance.

It is the experience of NAFC and its members over many years of monitoring public construction contracts that using strictly the low bid method of awarding public contracts - particularly those well below all other bids - will quite simply result in award of contracts based on fraud and deception because the contractor has no intention of paying unemployment insurance, workers compensation, overtime or prevailing wages to his workers and has every intention of cutting corners wherever possible in the quality of materials and workmanship provided. Following the low bid method of procurement - absent a standard to determine "responsibility" - results in contractors who will be rewarded for law-breaking by a continuing award of public contracts.

One such case encountered by a NAFC member is representative of literally thousands of other cases. The Work Preservation Fund, Inc., is a NAFC member. It is composed of over 500 contractors in the painting and decorating, drywall, glazing, floorcovering and allied trades throughout northern and central California and their counterpart labor representatives of the over 10,000 members of District Council 16, International Union of Painters and Allied Trades. The Work Preservation Fund was established over 20 years ago to combat the vast underground economy of contractors who regularly "cheat to compete" against legitimate, law-abiding contractors in order to win award of public contracts. Unfortunately, the practices of these contractors have

continued almost unabated over the last 20 years - despite the efforts of organizations such as the Work Preservation Fund - in large part due to lack of enforcement capability on the part of both state and federal enforcement authorities.

The Work Preservation Fund was successful in 1999 in obtaining state debarment of one painting contractor which had accrued some \$500,000 in wage under payments and over \$200,000 in penalties assessed by the California State Labor Commissioner on no fewer than a dozen different publicly-funded state and local construction projects.^{1/} But even though the contractor was ultimately debarred, it meant the battle was won, but the war lost. Why? Because law-abiding contractors were denied award of those twelve jobs and the local awarding bodies involved were confronted with the additional paperwork, costs and delays involved in working with state enforcement authorities to withhold funds necessary to pay the contractor's employees the monies owed to them and to see that the work contracted for was properly completed. State taxpayers were duped into handing over their hard-earned tax dollars to a law-breaker on twelve different contracts prior to the ultimate imposition of a 5-year debarment.

If the awarding bodies had responsible bidding laws - such as the December, 2000, responsible contractor regulations - available to them at that time, perhaps seven or eight or ten law-abiding contractors would have been awarded one or more of the twelve different jobs on which this law-breaking contractor lined his pockets with taxpayers' funds before he was finally debarred by the State of California. The absence of any quantifiable, objective criteria to help public agencies determine a contractor's level of "responsibility" repeatedly and continuously unfairly disadvantages those contractors who follow the law and play by the rules.

Responsible contractors in California got fed up with the unfair competition they faced in public contracting and in 1999 the legislature passed and Governor Gray Davis signed Legislation AB 574 authorizing state and local awarding bodies to institute a system in California to prequalify contractors bidding on public works. California's approach incorporates much of the same criteria as the final December 20 federal regulations requiring contractors to demonstrate a record of financial capability, trustworthiness, labor law compliance and job performance.

Indeed, there are many other jurisdictions at the state and local level which have responsible contractor laws and regulations. Another NAFC member, the Foundation For Fair Contracting of Massachusetts ("FFCM") (which is a joint labor-management organization), gave an award this year to the Purchasing Department of the City of Worcester for its commitment to enforcing Worcester's Responsible Employer

^{1/}The Statement of the Painting and Drywall Work Preservation Fund, Inc. (now known as the Work Preservation Fund), which fully describes this example, is attached and is also being submitted to be included in the record

Ordinance (REO). Last year, the Worcester Purchasing Department sanctioned 20 contractors for violating the city's REO while working on publically funded municipal projects. These contractors were guilty of a number of violations, including failure to pay prevailing wages and a failure to submit certified payroll records.

FFCM has found in many other instances that despite being debarred from federal work for fraud or other violations, contractors have been awarded contracts by the state or municipalities. The Foundation has a long history of keeping tabs on contractors who are federally banned and try to sneak into state public works contracts. The FFCM has persuaded state and local agencies in Massachusetts to add such contractors to their debarment lists and will continue to aggressively track such bans. FFCM's experience shows that law breaking contractors at both the federal and state are winning public contracts. The responsible contractor regulations would address this problem at the federal level, just as states and municipalities have done so in their jurisdiction.

The Foundation for Fair Contracting of Massachusetts has concluded, based on experiences such as that with Worcester, that responsible employer ordinances are important for the public, fair contractors and employees alike. Such laws and regulations ensure that workers receive the wages, benefits and conditions they deserve, and help to weed out law-breaking contractors before the bidding process, instead of waiting until they are on the job.

Another NAFC member is the Finishing Contractors Association (FCA),^{2/} a trade association which currently represents 750 union contractors within the finishing industry who perform painting and coating, glass, drywall, flooring, signs and displays, and other related finishing services throughout the United States. FCA supports the responsible bidder regulations because they will raise the quality, standards, and performance for all federal contractors. FCA contractors already ascribe to internal standards of ethics and business practices designed to gain the public's trust and confidence. Its members are highly trained to produce top-quality work in accordance with sound industry performance standards. These standards include rigid adherence to the nation's tax, labor, environmental, and employment discrimination laws, as well as careful attention to safety regulations and fair employment and contract fraud statutes. But FCA has documented that not all contractors adhere to the same self-imposed code of ethics and fair business practices. Such contractors do not keep the playing field level since they have abused the trust of the contracting officer, the federal government, the taxpayer and their competing contractors. Their unprofessional actions result in poorer quality work and an assault on the professional integrity of fair and responsible contractors and the public's trust.

^{2/}The June 18, 2001 Statement of the Finishing Contractors Association is attached and is being submitted for the record

As a result, like NAFC, FCA fully supports the responsible contractor regulations to ensure that contractors who violate the terms of their bid be held accountable through fines, penalties, suspension, and debarment. As professional contractors and concerned taxpayers, FCA agrees that unscrupulous contractors need to be denied the opportunity to bid on federal contracts because of their past unprofessional track records and violation of the laws specified in the final regulations.

The responsible contractor regulations will enable federal agencies to inquire into and evaluate a contractor's history of labor law compliance and job performance, thereby substantially reducing the number of repeat violators winning award of publicly-funded construction contracts simply because they have submitted the lowest possible bid, rather than the lowest responsible, responsive and realistic bid.

Public agencies have long been handicapped in their ability to assess and select "the lowest responsible" bidder in the absence of any tangible guidelines for determining what is "responsible." The final federal guidelines provide necessary and long overdue guidance. They will cull out the non-responsible bidders before they get on the job. For all of these reasons, NAFC strongly urges the federal government to lift the suspension of the final responsible contractor regulations published on December 20, 2000 and begin their enforcement immediately.

NAFC also urges that the suspension be lifted on two other parts of the December 2000 final rules. One of these provisions would change cost reimbursement rules to provide that the federal government would no longer reimburse government contractors for costs related to persuading their employees whether or not to form or join a union. Before the final December 2000 rules were issued, government contractors could, and did, obtain reimbursement by the federal government for the cost of holding captive-audience meetings – meetings where workers are required to attend and listen to anti-union speeches by management in the midst of a union organizing campaign. These activities have nothing to do with providing goods or services to the government and the public's tax dollars should not be used to subsidize this sort of activity. The federal government has no legitimate interest in paying for an employer's anti-union campaign activities.

Second, the Administration has suspended the rule providing that contractors can no longer be reimbursed for their legal defense costs when they lose a case brought against it by the federal government. For example, if a company is found liable for millions of dollars in back pay for violating the minimum wage and overtime requirements of the Fair Labor Standards Act, it can collect its legal defense costs from the same federal government that brought the case against the contractor and then prevailed. The December 2000 final rules would have closed this loophole. If it is not reinstated, the Administration is paving the way for contractors to have taxpayers pay their legal fees when they lose in court.

In addition, attached to NAFC's comments are Comments of NAFC members which have been submitted previously in support of the responsible contractor regulations. These comments come from joint labor-management groups, contractor associations and fair contracting organizations, including the Painting and Drywall Work Preservation Fund, Inc. (Work Preservation Fund); Finishing Contractors Association; Foundation for Fair Contracting (Pennsylvania); Foundation For Fair Contracting of Connecticut; Illinois Foundation For Fair Contracting, Inc.; Center For Contract Compliance (California); Midwest Region Foundation For Fair Contracting, Inc.; Illinois, Indiana, Iowa Foundation For Fair Contracting; Coalition For Fair Contracting, Inc. (Maryland); Laborers' Local Union No. 309 Foundation For Fair Contracting; Alliance for Competitive Contracting (New Jersey); Laborers Labor-Management Cooperation Trust (Rhode Island); Construction Business Group (Wisconsin); Wisconsin Laborers-Employers Cooperation and Education Trust; and Hawaii Laborers-Employers Cooperation and Education Trust; These statements are being submitted on behalf of each of these organizations and each statement is to be included in the record.

III. CONCLUSION

Responsible contractors must show they have the financial capability, performance record, business integrity and ethics to merit receiving a government contract. The "responsible" contractor requirement has been on the books for years yet NAFC's experience has shown that law-breakers frequently receive government contracts. The contractor responsibility regulations are necessary to put teeth into the requirement that a prospective contractor's record of compliance with labor, employment, environmental, consumer, and other laws is an important consideration in determining whether the bidder has a "satisfactory record of integrity and business ethics" and is eligible to receive a federal contract. It makes perfect sense that taxpayer-funded federal contracts should go to responsible, ethical contractors who respect the law, not to chronic lawbreakers. Responsible, law-abiding contractors are more trustworthy and dependable, and more likely to perform their contracts on a timely, reliable, and efficient basis. The new reforms simply clarify the existing requirements to specify that bidders with a record showing chronic noncompliance with the law might be found non-responsible. And importantly, that "responsibility" determination is for a particular contract only.

Taxpayers should not be forced to subsidize companies that break the law. Awarding federal contracts to companies that routinely violate the law is unfair to companies that do respect the law, and removes any incentive for lawbreakers to cease their behavior. This point is made in great detail by the FCA Comments which are attached as part of this record.

The new rules also provide contractors with more due process than they now have. The new rules spell out in great detail criteria, evidence, and information contracting officers must use to evaluate contractor ethics and integrity. The new rules

require contracting officials to consult with agency legal counsel before making a finding that a contractor is not responsible. Finally, if a bid is rejected because a bidder is found non-responsible, the bidder must be notified of that determination and the reasons for it. The bidder can appeal that decision to the contracting agency, to the Comptroller General, or to the courts.

For all of these reasons, NAFC and all of the organizations whose Comments are being submitted for the record along with NAFC's urge that the suspension of the responsible contractor regulations be revoked and that the Administration begin to immediately enforce the regulations.